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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CAMERON CHRISTOPHER WEST,

Defendant and Appellant.

C048234

(Super.Ct.No.03F08621)

A jury convicted defendant Cameron Christopher West of commission of a forcible lewd act with a child under age 14 and found that he inflicted great bodily injury on the victim. (Pen. Code, §§ 288, subd. (b)(1), 12022.8.) The jury made special findings that defendant took advantage of a position of trust and committed the present offense while on bail. (Cal. Rules of Court, rules 4.408, 4.421.) Defendant was sentenced to state prison for the upper term of eight years, plus five years for the enhancement. A concurrent term of two years was imposed for an unrelated case.

On appeal, defendant contends the trial court erred by (1) permitting the prosecution expert to opine that the victim was

credible, and that defendant was guilty; and (2) excluding a recording of a pretext telephone call from evidence. We shall modify the judgment.

#### FACTS

##### *Prosecution case-in-chief*

C. was eight years old when she testified at trial. Defendant, C.'s father, was divorced from C.'s mother in 2000. By 2002, he had visitation with C. every weekend.

On a Friday morning in September 2003, the mother took C. to her daycare center. Defendant picked up C. from the center that afternoon. The center's director did not notice anything unusual about C. that day.

Defendant and C. went to his residence. That evening, he told her to go to his bedroom. When they got there, he told her to pull down her pants and underwear. She did so and, at his direction, she laid down on the bed. He put his penis in her vagina. This hurt C., and she said "ow" several times. However, he "just kept doing it and told [her] to be quiet." When he finished she was bleeding, so he put a wash cloth on her vagina and had her get dressed. Later, she changed her clothes because the blood had soaked through the wash cloth. At some point, she took a bath and had to put toilet paper in her underwear. That evening, she vomited and had two bouts of diarrhea. She spent the night at defendant's house.

The next afternoon, the mother picked up C., who was waiting at the front door. C. appeared to be worried or upset. She looked at her mother and immediately went to the car.

Defendant told the mother that C. had complained of a stomach ache, and that she had vomited and had diarrhea the night before. Once they got home, C. fell asleep in the middle of the day, which was unusual for her. That evening, C. began to cry and complained that her upper thighs hurt.

That night, when the mother got ready for bed, she noticed that C. was up from her bed and appeared to be changing her clothes. Seven-year-old C. explained that she thought she had started puberty. The mother noticed that C. had blood on her underwear. She bathed C. and gave her a panty liner, which filled up with blood very fast. Her mother then took C. to a hospital emergency room.

The emergency room physician observed C. to have vaginal bleeding. Both C. and the mother told the physician that C. had not suffered any recent trauma. The physician ruled out early menstruation and vaginal cancer.

Four days later, the physician examined C. under general anesthesia. She noticed that no hymen was present and that C. was bleeding from two deep lacerations high inside the vagina. Based on the internal injuries, the physician was surprised that there was no trauma to the outside of the vagina. Believing that C. could not have caused the injuries by herself, the physician reported the case to Child Protective Services (CPS).

The mother asked C. several times if anything had happened to her vagina. She asked C. if her boyfriend or defendant had done anything; C. continued to say "no." The next day, C. spoke to a CPS worker and claimed not to know how she had been

injured. The day after that, C. was nervous and crying and told her mother that she did not want to talk about it. Her mother could tell that C. was "holding back stuff." The following day, the mother brought C. to her bedroom and again asked what happened. C. cried and would not look at her mother. C. denied that the boyfriend had done anything. When asked if defendant had done something, C. said, "I'm afraid." She explained that defendant had put something in her private area. The mother called the CPS worker. C. eventually told her mother that defendant had put his private part in her.

C. was taken to a different hospital for an examination by a nurse practitioner. This examination revealed two lacerations in the vagina, healing injuries on the vaginal wall, and healed hymenal injuries. Due to the placement of the injuries high in the vagina, the nurse practitioner at first believed that C. had been penetrated by a sharp foreign object. Later, she concluded it was possible that a penis had caused the injuries.

#### *Defense*

Defendant testified and denied ever sexually abusing C.

Defendant testified that the mother telephoned him to confront him about molesting C. While he denied sexually abusing C., he told the mother that he would do his best to make sure "nothing like that ever happens again." Defendant said he was sorry about whatever happened, and he promised that it would never happen again. Defendant added, "if I did do something to her, that I never intended to."

## DISCUSSION

### I

Defendant contends the trial court abused its discretion when it allowed a prosecution expert, Dr. Urquiza, to "opine that [C.] was a credible witness and that [defendant] was guilty." We are not persuaded.

#### *Background*

Dr. Urquiza testified for the prosecution as an expert on the issue of child sexual abuse accommodation syndrome (hereafter CSAAS or the syndrome).

After the prosecutor established Dr. Urquiza's background and experience, the trial court preinstructed the jury as follows: "Evidence will be presented to you concerning child sexual abuse accommodation syndrome. This evidence is not received and must not be considered by you as proof that the alleged victim's molestation claim is true. [¶] Child sexual abuse accommodation syndrome research is based upon an approach that is completely different from that which you must take in this case. [¶] The syndrome research begins with the assumption that a molestation has occurred and seeks to describe and explain common reactions of children to that experience. [¶] As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt. [¶] You should consider the evidence concerning the syndrome and its effect only for the limited purpose of showing, if it does, that the alleged victim's reactions as demonstrated by the evidence are

not inconsistent with her having been molested." (CALJIC No. 10.64.)

Dr. Urquiza then testified, "It's not my role to make any opinion about whether a particular child has been sexually abused or to provide an opinion with regard to whether any particular person is a sexual offender or not." He reiterated that the syndrome "shouldn't be used to make a determination about whether somebody has been sexually abused or whether somebody is a perpetrator or not."

Dr. Urquiza described the five elements or stages exhibited in the syndrome: secrecy, helplessness, entrapment and accommodation, delayed or unconvincing disclosure, and retraction. (See *People v. Wells* (2004) 118 Cal.App.4th 179, 186.) This exchange followed:

"Q [BY THE PROSECUTOR]: I want to pose for you a hypothetical that has a few factors in it. So if you could just follow along for a moment. Okay. [¶] Assume for the moment that you have a seven[-]year[-]old female who presents to medical personnel with a vaginal injury, and the opinion of the medical personnel is openly stated that this child has been sexually abused, and that is presented to the child, the child denies initially any contact with her vagina that could result in that injury over a period of time, ultimately discloses that it is a family member, specifically her father, during a known visit, but she provides no details as to how or what was used to cause the injury, and then subsequently still evolves to the point where she says more detail about what happened and how she

suffered the injury. Assuming all of those facts, and what that child has essentially disclosed in the end is that she was injured by her father putting his penis or another object in her vagina, *is that consistent or inconsistent with your training and experience in the area of child sexual abuse accommodation syndrome, is it consistent or inconsistent with a child who has been sexually abused?*

"[DEFENSE COUNSEL]: I must object, Your Honor. Number one, it's compound, but I think it's an inappropriate hypothetical. I need to -- this is a matter for the jury to determine.

"THE COURT: I'm going to overrule your objection. All hypotheticals are compound. [¶] And the point of the appropriateness for the expert, I will reinstruct you, ladies and gentlemen, at a later time regarding the child sexual abuse accommodation syndrome and remind you at this point as well that *the doctor is not testifying about [C.] in this case. He is testifying<sup>1</sup> as to whether a particular kind of conduct is consistent or inconsistent with someone who has been abused or consistent or inconsistent with the syndrome that he has defined. He doesn't know anything about [C.] in this case. [¶] You may answer the question.*

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<sup>1</sup> Defendant misquotes the trial court as stating that the doctor "*is not testifying as to whether a particular kind of conduct is consistent . . . .*" (Italics added.)

"[DR. URQUIZA]: Well, given the information that you had, my first response was pretty much what you just said, that I can't make that assertion that a particular child is abused or not, but the information that you provided is consistent with two parts of the accommodation syndrome. One is this process of disclosure, that children don't usually come out and tell all that happened at the same time. There is usually a period of time and a process by which they tell more and more about what happened to them, and there are lots of reasons, and one of the main ones is they feel more safe and more secure which enables them to talk more about what happened, and then a little less directly the information that you provided, I think, also points out some of the ambivalence that child victims have with regard to disclosing something sexually inappropriate with somebody who's a member of their family in the case that you gave with regard to the father. It is an extraordinarily difficult thing for a lot of kids to make that disclosure, and that is often one of the reasons why, although you didn't specifically state it, there is a fair amount of time elapsed from when that first incident of abuse occurs to when they're eventually able to disclose, *and so it's not surprising to hear that the first time they were asked did it happen to you, did your father molest you, that you would hear a child who would say no, it [sic] didn't.*

"Q. Even in the face of physical injury?

"A. Well, that's one of the things in this field that is incredibly difficult when you have a medical examiner who says

this is an injury that is consistent with victimization and yet you have a victim who says no, it didn't happen to me, I've never been sexually abused, and *probably the most consistent reason for that is because there's some significant pressure, either externally, somebody threatening them, or internally, their own fear, to keep them quiet, this issue of secrecy.*

"Q. You've never met [C.]; have you?

"A. No. Although there was a girl who walked out before I came in.

"Q. Did she interact with you at all out there?

"A. No." (*Italics added.*)

During closing argument, the prosecutor explained that "child sexual abuse accommodation syndrome is not a tool to determine if a child has been assaulted. It is not a tool for that." Defense counsel argued that "child sexual abuse accommodation syndrome does not really belong in the courtroom, because you have to presume that the child is a victim."

Following the arguments of counsel, the trial court reinstructed the jury with CALJIC No. 10.64.

#### *Analysis*

Defendant claims his objection to the hypothetical question should have been sustained because "it asked for, and Dr. Urquiza improperly gave, an opinion" that C.'s testimony was credible. We disagree.

CSAAS evidence "must be tailored to the purpose for which it is being received." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393; see *People v. Wells, supra*, 118 Cal.App.4th at pp.

186-187; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300; see generally *People v. Bledsoe* (1984) 36 Cal.3d 236, 247-251.)

"[A]t a minimum the evidence must be targeted to a specific 'myth' or 'misconception' suggested by the evidence.

[Citation.] For instance, where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust." (*People v. Bowker*, *supra*, at pp. 393-394.)

In this case, the jury was preinstructed that the CSAAS evidence "is not received and must not be considered by you as proof" that C.'s testimony was true. Dr. Urquiza testified that it was "not [his] role" to opine whether C. had been sexually abused, and that syndrome evidence "shouldn't be used" to make that determination. The disputed question asked whether a child's initial denial of abuse, subsequent identification of her father and withholding of details of the offense, and eventual disclosure of the injury itself, was consistent with the hypothesized child having suffered sexual abuse. After the prosecutor posed the question, the trial court instructed the jury that "the doctor is not testifying about [C.] in this case[,] and that he, in fact, "doesn't know anything about" C. Before the case was submitted to them, the jurors were reminded that the CSAAS evidence was "not received and must not be considered by you as proof" that C.'s claim was true.

Thus, the disputed question was directed at the specific "myth" or "misconception" that a victim of sexual abuse would promptly report the abuse rather than issue the protracted series of partial disclosures described in the hypothetical. (*People v. Bowker, supra*, 203 Cal.App.3d at pp. 393-394.) The jury was repeatedly instructed that the hypothetical question was "not intended and should not be used to determine whether" C.'s molestation claim was true. (*Id.* at p. 394.)

We presume the jurors were "intelligent people who are capable of understanding and following the court's instructions. [Citation.]" (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 407.) In light of the repeated instructions, reasonable jurors would not have understood Dr. Urquiza's testimony as opining that C. was a credible witness; he had not met her, did not know her, and obviously lacked any basis to form such an opinion. Nor would reasonable jurors have understood Dr. Urquiza to be opining, in turn, that because C. was credible defendant must be guilty. Reasonable jurors would have understood Dr. Urquiza to be opining simply that the protracted nature of C.'s disclosures *should not adversely affect* the jury's assessment, whether favorable or unfavorable, of C.'s credibility.

## II

Defendant contends the trial court erred by excluding from evidence the tape recording of the pretext telephone call. He argues (1) the court abused its discretion by refusing to allow him to reopen his case, and (2) Evidence Code section 356

allowed him to put the recording in evidence. We are not persuaded.

### *Background*

Defendant testified that he had a lengthy telephone conversation with the mother and C., which he later discovered had been tape recorded. Defendant described the mother as "badgering me just relentlessly, asking me what I had done to my daughter, you know, how I had hurt her, what I had done to her, what I had put inside of her. At one point she had asked me do you want me to lie." Defendant added that the mother "continued more and more to badger me and to try and basically coerce me to say that I had done something to her daughter over the phone." During the conversation, defendant repeatedly denied hurting C. Defendant acknowledged that, when the mother asked him if it was possible he did something to C. in her sleep, he responded, "I was asleep, I don't know." The prosecutor questioned defendant about comments he made during the telephone call.

After the defense rested and the prosecution declined rebuttal, the trial court met with counsel to discuss the moving of trial exhibits into evidence. Defense counsel requested that the tape recording of the pretext call be played for the jury. She conceded that "[w]e had extensive testimony on the pretext call," but she noted that defendant "seems to feel that the actual flavor of the interview would be crucial to the jury understanding what it was he was having to endure at that particular time." The prosecutor objected, stating that the tape "was available to either side if we chose to play the tape.

For, I assume, tactical purposes on the defense, as well as certainly tactical purposes on the prosecution's side, it was not played. And I think that now is an inappropriate time to attempt to introduce a tape recording without foundation and without an opportunity to further question witnesses." The court denied the request without comment.

Defendant later moved for a new trial based, in part, on the court's refusal to let him reopen his case to present the tape recording of the pretext call. The prosecutor responded that the court acted within its discretion in refusing to allow defendant to reopen his case, which would have necessitated recalling the mother, probably C., and perhaps the detective who recorded the call.

The trial court denied the new trial motion, specifically ruling that the exclusion of the tape did not require a new trial: "Now, as to the pretext tape, there was exhaustive examination of the defendant in connection with the pretest tape. It went on at great length. [¶] I think that any issues relative to the pretext tape and its implications for this case were thoroughly and comprehensively plumbed and that there would be nothing to be added by providing the tape itself or playing the tape itself which, as you know, would not typically be put before a jury in a case, although with the discretion of the Court's ruling could be. [¶] So even if you had made a timely request, which you did not, for the introduction of the pretext tape, I probably would have denied it. [¶] In any case the request made was after the parties had rested, and as [the

prosecutor] indicates, I had told [the jurors] upon excusing them that day that we would be arguing and instructing when we next saw them."

### *Analysis*

We shall assume, without deciding, that defendant would have adduced admissible evidence had his motion to reopen been granted. It is not necessary to consider at length his argument that Evidence Code section 356 made the tape recording admissible.

A trial court's denial of a motion to reopen a criminal case to permit the introduction of additional evidence is reviewed for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 282; *People v. Marshall* (1996) 13 Cal.4th 799, 836.) Factors to consider "include the stage the proceedings had reached when the motion was made, the diligence shown by the moving party in discovering the new evidence, the prospect the jury would accord it undue emphasis, and the significance of the evidence." (*Ibid.*; *People v. Rodriguez* (1984) 152 Cal.App.3d 289, 294-295.)

The motion to reopen was made immediately after both sides rested and before arguments commenced. Thus, the court and jury would not have been greatly inconvenienced.

However, the tape was not "new evidence," in that it had been available throughout the trial and was largely cumulative of testimony the jury had already heard. (*People v. Marshall, supra*, 13 Cal.4th at pp. 835-836.)

Nor had the defense shown diligence in asserting any need to hear the taped voices. The first request to play the tape was made after both sides rested. (*People v. Marshall, supra*, 13 Cal.4th at p. 836.)

The tape's only claimed evidentiary significance was that it would assist the jury's "understanding what it was [that defendant] was having to endure at that particular time." However, it was undisputed that defendant was enduring a lengthy telephonic confrontation by the mother. Defendant testified, "I was very confused, very scared and very hurt that I was being accused of hurting my daughter, something I would never do." At best, the tape would have corroborated defendant's emphatic description of how the confrontation had affected him. On this record, denial of the motion to reopen was not an abuse of discretion.

### III

Defendant's offense, violation of section 288, subdivision (b)(1), is listed in section 667, subdivision (c)(6). Thus, section 2933.1, subdivision (c), limits his presentence conduct credit to 15 percent of his presentence custody credit. His 353 days of custody credit entitle him to 52 days of conduct credit, not the 176 days awarded by the trial court. The 15 percent limitation was applied when the credits were originally calculated in the probation report, but it was overlooked when

the credits were updated at sentencing. We shall modify the judgment to award proper credit.<sup>2</sup>

#### IV

Our review of the record discloses minor errors on the abstract of judgment.

Count 1A is the principal term; the box "consecutive full term" should not be checked.

The two-year term on count 1B is concurrent; it should not be listed in the column for "principal or consecutive time imposed."

The abstract must state whether defendant's local conduct credits in each case are calculated pursuant to section 4019 or section 2933.1. As noted, the credits in case A are limited by section 2933.1.

#### DISPOSITION

The judgment is modified to award defendant 52 days of conduct credit. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment, corrected as stated above; and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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<sup>2</sup> The issue of conduct credit seems noncontroversial and the court has resolved it summarily in this opinion, in the interest of judicial economy. Any party claiming to be aggrieved by this procedure should petition for rehearing. (Gov. Code, § 68081.)

MORRISON, J.

We concur:

RAYE, Acting P.J.

BUTZ, J.